THE "BEAUTY ORCHID II"; PACIFIC CORPORATION TRADERS v. "BEAUTY ORCHID II" OWNERS & ORS.

[O.C.J. (Arulanandom J.) May 31, 1976]

[Penang — Admiralty Suit No. 8 of 1976]

Practice & Procedure — Writ of Summons without statement of claim filed — Non-compliance with R.S.C. 1957, O. 20 r. 3 — Administration of Justice Act, 1958, s. 1 para. 8 — Courts of Judicature Act, 1964, s. 24(b) — R.S.C. 1957, O. 20 r. 3 & O. 70 r. 3.

The plaintiffs in this case were shippers who filed the writ with an indorsement of claim against the defendants as follows:- "The plaintiffs claim damages for breach of contract evidenced by or contained in nine (9) Bills of Lading issued by or on behalf of the defendants in respect of the carriage of sawn timber from Singapore and delivery at Dammam. The plaintiffs are the shippers of the goods and owners of the said sawn timber." The defendants entered appearance under protest. They applied to set aside the writ on the grounds that the plaintiffs have no cause of action.

Held, setting aside the writ: (1) the court should not usurp the functions of the trial court and go into the merits of the case and decide whether the plaintiffs will or will not succeed at the trial. The court's duty is to decide whether or not on the pleadings the plaintiffs have a cause of action or not;

(2) the writ of summons, did not have a Statement of Claim and therefore is not a pleading and neither was the indorsement on the pleading;

(3) having only the writ of summons and its indorsement to look at with no statement of claim although the Rules of the Supreme Court requires a statement of claim to be filed, the court is in no position to say that the plaintiffs have a cause of action.

Cases referred to:-

(1) *Sea Breeze Navigation Co. S.A.* v. *Owners of Ship "Hsing An"* [1974] 1 M.L.J. 45.

(2) *Wenlock* v. *Moloney & Ors.* [1965] 1 W.L.R. 1238.

(3) *The St. Elefterio* [1957] P. 179, 187.

(4) *Wallis* v. *Jackson* (1883) 23 Ch.D. 204.

(5) *Murray & Anor.* v. *Stephenson* (1887) 19 Q.B.D. 60.

ADMIRALTY SUIT.

V. Thevendran for the applicants/defendants.

C. Arul (*N.T. Vello* with him) for the respondents/plaintiffs.

Arulanandom J.: This is an application by the defendants in this suit by Notice of Motion that the Writ of Summons dated March 16, 1976, the service thereof and all subsequent proceedings be set aside on the grounds that the plaintiffs have no cause of action against the defendants. The plaintiffs in this case who were shippers filed the writ in this court with an Indorsement of Claim which reads as follows:—

"The plaintiffs claim damages for breach of contract evidenced by or contained in nine (9) Bills of Lading issued by or on behalf of the defendants in respect of the carriage of sawn timber from Singapore and delivery at Dammam or non delivery thereof at the Port of Dammam. The plaintiffs are the shippers of the goods and owners of the said sawn timber."

The plaintiffs raised an objection to the Notice of Motion and claimed that it was defective as it did not comply with Order 70 rule 3 of *The Rules of the Supreme Court* which reads: —

"3. Where an application is made to set aside proceedings for irregularity, the several objections intended to be insisted upon shall be stated in the summons or notice of motion."

As the grounds of objection to the writ were stated in the affidavit supporting the Notice of Motion I did not consider the defect fatal to the Notice of Motion and considered the application to set aside.

Several affidavits were filed concerning the merits of the case for the plaintiffs and the defendants. Briefly the defendants' case was that they as shipowners had contracted to deliver the plaintiffs' goods at Dammam or Ras-Tanura or Al-Jubayl at their own discretion and that the consignees were to take delivery of cargo at shipside on anchorage upon vessel's arrival which the plaintiffs did not do. For this they relied on a letter of indemnity signed by the plaintiffs and given to the defendants. The defendants also claimed that the non-delivery was wholly due to the fault of the plaintiffs and that the defendants were still endeavouring to deliver the cargo to the plaintiffs. The plaintiffs' affidavits were to the effect that the letter of indemnity given by them was only for their contract which was for the goods to be delivered at Dammam. In his submission to the court, plaintiffs' counsel stated that at the trial they would establish that the letter of indemnity exhibited to the defendants' affidavit was a forgery.

In considering the law on the question of what documents the court could look at and consider whether the plaintiffs had a cause of action or not, I accepted the submission of counsel for plaintiffs that the court should not usurp the functions of the trial court and go into the merits of the case and decide whether the plaintiffs will or will not succeed at the trial. That is the trial court's function. This court's only duty is to decide whether the plaintiffs have a cause of action or not. And to do this the court can only look at the pleadings filed so far and which are before me. In *Sea Breeze Navigation Co. S.A.* v. *Owners of Ship "Hsing An"*(1) where again there was an application to set aside the writ of summons on the ground that the claim disclosed no reasonable cause of action, the court held that the affidavits were not to be looked into for a decision as to whether there was a reasonable cause of action or not and that the only documents which could be looked at were the pleadings. At page 47 Chua J. cited the case of *Wenlock* v. *Moloney & Ors.*(2) and said:

"In *Wenlock* v. *Moloney & Ors.* by his writ and statement of claim the plaintiff claimed damages against the three defendants for conspiring to oust him from the business of a company. The defendants delivered defences denying the allegations made against them in the statement of claim. After the pleadings were closed the plaintiff issued a summons for directions in the ordinary way but before it was heard the defendants applied to the Master under R.S.C. Order 18 rule 19 (which is in similar terms to our Order 18 rule 19) (and similar to Order 19 rule 27 of the R.S.C. of the States of Malaya) alternatively under the inherent jurisdiction of the court, to strike out the pleadings and dismiss the action on the grounds, inter alia, that the pleadings disclosed no reasonable cause of action. On the hearing of the application to strike out, ten affidavits were filed, five by the defendants in support of the application and five by the plaintiff in opposition thereto. The Master read the affidavits, the documents exhibited thereto and considered the issues of fact raised by the affidavits in a four-day hearing. There was no cross-examination on the affidavits or oral evidence. In his reserved judgment the Master held that the plaintiff's action was most unlikely to succeed and he, accordingly, struck out the pleadings and the action. The plaintiff appealed to the judge in chambers who dismissed the appeal. On appeal to

the Court of Appeal the court refused to look at the affidavits. It was held that the trial by the Master of issues of fact on affidavits to ascertain whether the plaintiff had a case was a usurpation of the functions of the trial judge and was a wholly improper procedure and that since the pleadings on their face disclosed a reasonable cause of action and raised issues of fact which required to be determined on oral evidence by a judge, the action would not be struck out but would proceed to trial.

Sellers L.J. in the course of his judgment said (at page 1242 G):

'If, as here, the only ground on which the action can be said to disclose no reasonable cause of action is that it is not one which is likely to succeed, then I doubt whether affidavit evidence was admissible'."

In this case plaintiffs filed a writ on the 16th day of March 1976 and arrested the ship "Beauty Orchid" belonging to the defendants on the same day. The defendants entered appearance under protest on March 26, 1976 and filed this application to set aside the writ on April 6, 1976. It has not been suggested that the proceedings are frivolous or vexatious so as to call for the exercise of the court's inherent jurisdiction to halt such proceedings *in limine*.

Therefore in considering the application to set aside the writ on the grounds that the plaintiffs have no cause of action, the merits of the case cannot be gone into at this stage but at the same time, while the court is not entitled to judge on the merits of the case, the court has to consider whether a cause of action is shown on the pleadings. While under Admiralty practice once a summons and claim are shown to the court the powers of arrest can be exercised immediately, the consequences of the arrest are often crippling or severely damaging to the shipowners. No doubt there is an undertaking in damages and if in the long run the plaintiff loses his case, he will have to pay damages but the amount of damages the defendant will recover will depend on the assets or the solvency of the plaintiff. The arrest of the ship immediately exposes the defendants to various claims from cargo owners, masters, crews and others affected by the arrest. Willmer J. in the case of *The St. Elefterio*[3] says this about the position of defendants when their ships are arrested: —

"The fact is, and this is the sanction against abuse, that the plaintiffs, if their alleged cause of action turns out not to be a good one, will be held liable for costs, and those costs will include the costs of furnishing bail in order to secure the release of the ship. The defendants can always secure the release of their ship by the simple expedient of furnishing bail. It is true that if, as they say it will, the action fails, they will probably not recover inter partes the whole of the costs of furnishing the bail; but in that respect I do not know that they are in any different position from other defendants in other types of action. That observation applies especially in these days of legal aid. There is many a defendant, who has been unsuccessfully sued, and who at the end of it all finds himself in the position that he cannot recover the whole of his costs. That is one of the incidents of litigation which, as it seems to me, parties have to accept in modern conditions."

For Admiralty actions our courts are governed by section 24(b) of the Courts of Judicature Act which reads as follows: —

"24. Without prejudice to the generality of section 23 the civil jurisdiction of the High Court shall include —

(a) the same jurisdiction and authority in relation to matters of admiralty as is had by the High Court of Justice in England under the United Kingdom Administration of Justice Act, 1956;"

Section 1 of the Administration of Justice Act, 1956, paragraph 8, gives the courts jurisdiction to hear and determine the question of any claim arising out of any claim relating to carriage of goods in a ship or the use or hire of a ship. Therefore as far as this case is concerned the task of the court is to see whether on the pleadings as they are, without reading any affidavit whatsoever there is a triable issue falling within that section. When one looks at the pleadings in this case there is only the writ with an Indorsement of Claim. Although our Rules of the Supreme Court Order 20 rule 3 states that "In Admiralty actions *in rem* the plaintiff shall, within twelve days from the appearance of the defendant, deliver his statement of claim" no Statement of Claim has been filed. Plaintiffs' counsel submits that it is not the practice to follow the rules. I cannot accept that submission. It may be that the Singapore Rules do not have a similar rule to ours but the rule stands in both the English Rules and our Rules; and the Rules of the Supreme Court are there to be followed. In this case it has not been complied with. If the plaintiffs have not done so, it has been at their own peril. So far as this court is concerned it is left in a position where it has to decide whether there is a cause of action or not purely on the Indorsement on the Writ. Now the Writ of Summons, unless it is a Specially Indorsed Writ, indorsed with a Statement of Claim or accompanied by a Statement of Claim, does not have a Statement of Claim and therefore is not a pleading. (See *Mallal's* R.S.C. Vol. 1 page 236). Furthermore in *Wallis* v. *Jackson*,[4] Chitty J. held that the indorsement on the writ was not a pleading where the rules for service under Order 64 rule 11 of the Rules of the Supreme Court applied. In *Murray & Anor.* v. *Stephenson*,[5] the Divisional Court went further and held that even a Specially Indorsed Writ was not a pleading even though a Statement of Claim was indorsed.

The indorsement on a writ is purely a process issued at the instance of the plaintiff for the purpose of giving the defendant notice of the claim made against him and compelling him to appear and answer it if he does not admit it. It is the first step in an action. The indorsement on the writ if not specially indorsed is just a brief statement of the nature of the plaintiff's claim. It does not give any facts which the defendant can traverse or deny or join issue on. A "cause of action" on the other hand is defined in *Words & Phrases Legally Defined* (2nd Ed. p. 22) to mean every fact which is material to be proved to entitle the plaintiff to succeed — every fact which the defendant would have a right to traverse. According to *Jowitt's Dictionary of Law* the definition of "cause of action" is given as: —

"Cause of action, the fact or combination of facts which give rise to a right to sue. Thus in the case of some torts (e.g. trespass), the cause of action is the wrongful act; in the case of other torts (e.g. negligence), the cause of action consists of two things, the wrongful act and the consequent damage. The phrase is of importance chiefly with reference to the Limitation Act, 1939, and the jurisdiction of certain courts. Thus, time begins to run when the cause of action arises (unless postponed or revived by reason of fraud, mistake, acknowledgment, etc.). It is thus necessary to determine the date upon which the cause of action arises. Again, the jurisdiction of an inferior court is frequently limited to cases where the cause of action or some part of it arises within the district of the court."

This is a case where the plaintiffs have arrested a ship. They have exercised their powers under the Admiralty Rules and thereby caused the defendants a complete stoppage of their ship's business. The defendants have challenged the plaintiffs' claim on the ground that the plaintiffs have no cause of action or even if they have it is premature. On the principles laid down in the abovementioned cases, the court can only look into the pleadings to decide whether there is a cause of action or not. In the circumstances it would have been incumbent on the plaintiffs to file their statement of claim to enable the court to make that decision. But they have not done so. The plaintiffs argue that as the appearance was a conditional one, there was no need for the plaintiffs to file a Statement of Claim as the appearances only become unconditional if the defendants do not file an application to set aside the writ. Here the defendants have filed an application to set aside the writ on the grounds that the plaintiffs have no cause of action and it is the duty of the plaintiffs to comply with Order 20 rule 3 of our Rules of the Supreme Court to enable the court to decide if there is a cause of action at all. For the court to hold otherwise would be to enable persons with no cause of action at all against others to have their ships arrested on a mere Writ of Summons and expose the defendants to all the inconvenience, loss or damage which will follow, especially where in case the plaintiffs were men of straw, the undertaking to compensate the defendants in damages will not be worth the paper it is written on.

Having only the Writ of Summons and its indorsement to look at with no Statement of Claim although the Rules of the Supreme Court requires a Statement of Claim to be filed, the court is in no position to say that the plaintiffs have a cause of action.

Therefore at this stage looking at only the pleadings in the file the court can only make a finding that the plaintiffs have not established a cause of action. For this reason the writ and all subsequent processes are set aside and the ship 'Beauty Orchid' released from arrest.

Order accordingly.

Solicitors: *Allen & Gledhill; Chong & Vello.*

ABDUL MOKHTI BIN HAJI AHMAD v. IDRIS BIN IBRAHIM

[O.C.J. (Arulanandom J.) February 23, 1976]
[Penang — Civil Suit No. 210 of 1973]

Negligence — Damages — Personal injuries suffered — Duty of drivers following a leading car.

The plaintiff claimed damages against the defendant for personal injuries suffered by him as a result of the defendant's negligent driving. The plaintiff alleged that on March 28, 1973 at about 12.30 a.m. he was riding his motor cycle along Telaga Ayer Road towards Bukit Mertajam with one Shahidi as his pillion rider. As he was proceeding along the road the defendant drove his motor taxi along the same road in the same direction and somewhere near the junction of Telaga Ayer Road and Jalan Chempah the defendant overtook the plaintiff without any warning and immediately stopped in front of him and thereby caused an accident. He claimed that there was insufficient time and space for him to avoid the defendant's car as a result of which the plaintiff collided into the rear of the defendant's taxi. The plaintiff alleged that at the material time, he was riding the motor cycle at about 20-25 m.p.h. The defendant on the other hand claimed that he did overtake some vehicles but after overtaking he had travelled a distance of four lamp-posts without overtaking any vehicle when a dog ran across his path from the right to the left and he jammed on his emergency brakes.

Held, dismissing the plaintiff's claim: (1) it was the duty of the driver following a leading car to drive in such a fashion so as to avoid accidents rising out of exigencies of the leading car. The duty was a continuing duty which exists independently of negligence of the leading driver;

(2) in the circumstances the court could not find evidence of any negligence on the part of the defendant.

Cases referred to:-

(1) *Parkinson* v. *Liverpool Corpn.* [1950] 1 All E.R. 367.

(2) *De Cotta* v. *Tan Hock Lee* [1972] 2 M.L.J. 173.

CIVIL SUIT.

Triptipal Singh for the plaintiff.

Peh Swee Chin for the defendant.

Arulanandom J.: In this case the plaintiff sues the defendant for damages for loss of vision and injuries suffered by him as a result of an accident caused by the negligent driving by the defendant of motor taxi No. PE 3789 on 28th day of March, 1973 at about 12.30 a.m. along Telaga Ayer Road, Butterworth, together with interest and costs.

According to the plaintiff, on March 28, 1973, at about 12.30 a.m. he was riding his motor cycle, PN 1234, and was proceeding along Telaga Ayer Road towards Bukit Mertajam with one Shahidi bin Yahya as his pillion rider. As he was proceeding along the road the defendant drove his motor taxi No. PE 3789 along the same road in the same direction and that somewhere near the junction of Telaga Ayer Road and Jalan Chempah the defendant overtook the plaintiff without any warning and immediately stopped in front of him and thereby caused an accident. He alleged he tried to avoid the defendant's car by swerving right but could not do so because there was neither sufficient time nor space to do so. He therefore collided into the rear of the defendant's taxi. He alleged that he was riding the motor cycle at about 20-25 m.p.h. He further suggested that the reason for the defendant overtaking and cutting in front of him and stopping suddenly was that some ladies were standing on the